Supreme Court, U. S.
FILED
NOV 16 1977
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-700

BOYD D. EVANS and LOIS A. EVANS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioners, Boyd D. Evans and Lois A. Evans, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 14, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, p. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1977. (App., infra, p.4a) A timely petition for rehearing and suggestion for rehearing en banc was denied on October 17, 1977. (App., infra, p.5a) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)

QUESTION PRESENTED

Whether, in a prosecution for making a false statement to a government agency in violation of 18 U.S.C. § 1001, it is proper to instruct the jury that the element of acting "knowingly and willfully" may be established by proof that the defendant made the statement with "reckless disregard" for its truthfulness.

STATUTE INVOLVED

18 U.S.C. § 1001

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Preliminary Statement

Petitioners Boyd and Lois Evans (husband and wife), and five others were charged in a 13-count indictment with knowingly and willfully making false statements or representations to a department or agency of the United States in violation of 18 U.S.C. § 1001.

Lois Evans was tried before the Hon. John A. Reed Jr. and a jury in the United States District Court for the Middle District of Florida in February and March, 1976. Boyd Evans, who was granted a severance, was tried before the same judge and a jury, in May, 1976.

Lois Evans was convicted on all counts and Boyd Evans on three counts. They were both sentenced to concurrent terms of three years on each count, with all but four months suspended. Each was also fined a total of $10,000.

Basis of the Indictment

As suppliers and servicers of respiration equipment, the Evans Respirator Company, operated by petitioners, often had occasion to submit bills on behalf of their patients to Medicare Part B. That is the division of the Social Security Administration which handles claims of, and payments to, suppliers of medical equipment. The actual processing of the claims was handled by Blue Shield of Florida under contract with the Social Security Administration.

The government alleged that petitioners submitted claims to Blue Shield of Florida for services and supplies that were not actually rendered or supplied.

The Charge to the Juries

At the trials of both petitioners, the Court instructed the jury as follows regarding intent:

> The terms knowingly and willfully as used in relation to the making of a statement mean the statement must have been made voluntarily, deliberately, and intentionally and with the knowledge of its contents and falsity of its contents as distinguished from the making of a false statement by inadvertence, mistake, carelessness or for any other innocent reason.
>
> However, a person who makes a statement with a reckless disregard of the truthfulness of the statement and with a conscious purpose to avoid learning the truthfulness of the statement is deemed to have knowledge of the statement and its truthfulness of [sic] lack thereof.

Petitioners contend that the quoted portion of the charge concerning "reckless disregard" of truthfulness is an inaccurate statement of the law and that the trial courts' error warranted reversal of their convictions. The Court of Appeals held the charge to be proper and affirmed.

REASONS FOR GRANTING THE WRIT

Without further explanation, the trial court's equating of "reckless disregard of the truth" with actual knowledge, erroneously instructed the juries as to the degree of culpability that the government was required to prove. In affirming petitioners' convictions, the Court of Appeals condoned the use of a charge which has come under increasing criticism.

The principal cases cited by the court below in support of its decision upholding this charge emanate from the Second Circuit. United States v. Abrams, 427 F.2d 86 (2d Cir.), cert. denied, 400 U.S. 832 (1970); United States v. Engenberg, 441 F.2d 441 (2d Cir.) cert. denied, 404 U.S. 994 (1971); and United States v. Sarantos, 455 F.2d 877 (2d Cir. 1972).

However, careful examination of these and other cases will show that the Second Circuit

actually disfavors use of the charge and is on the brink of forbidding it.

Abrams, supra, the case relied on in Engenberg, supra, and Sarantos, supra, did not concern a jury instruction. Rather, the court stated that the evidence in that case was such that the jury could have found that the defendant "acted with reckless disregard of whether the statements made were true and with a conscious purpose to avoid learning the truth." 427 F.2d at 91. This discussion of the evidence has since been cited as approving the complained of instruction. However, it is a gross distortion of the Abrams opinion to find that it supports the instruction.

In one of its most recent pronouncements on the subject, the Second Circuit upheld a conviction wherein "knowingly" and "willfully" were key elements stating, "Our conclusion is supported by the fact that the trial judge scrupulously avoided use of the technical

and confusing phrase 'reckless disregard' . . . . "

United States v. Gentile, 530 F.2d 461, 470

(2d Cir.) cert. denied 426 U.S. 936 (1976).

This year, the Second Circuit in United

States v. Hanlon, 548 F.2d 1096, 1101-1102,

(2d Cir. 1977), stated:

> We are troubled, however, by the repeated use of the term "reckless." This Court has previously had occasion to criticize the use of this "technical and confusing" term. United States v. Gentile, supra, 530 F.2d at 470; United States v. Bright, supra; see United States v. Sarantos, supra. The distinction between recklessness and negligence is elusive enough for even the most respected legal scholars. See Prosser on Torts, 32, 184-86 (4th ed. 1971). It follows that to the laymen on the jury, it might prove a significant source of confusion. It is thus preferable, in cases such as this, to omit the use of the term. It adds nothing to the "conscious avoidance" language which we have approved, and might tend to mislead the jury. We are satisfied that, in this case the challenged portion of the charge was not error, plain or otherwise. However, should trial courts continue to employ this disfavored language, we will not hesitate to take appropriate corrective measures. . . .

The court in Hanlon recognized that the failure to insure that jurors are properly instructed in terms which are meaningful to them severely hampers the search for justice and can no longer be countenanced.

Thus, the Second Circuit has clearly put to rest the notion that Abrams or its progeny should be read as approving the "reckless disregard" charge.

Here, the anomolous situation exists wherein the Fifth Circuit has relied on Second Circuit decisions in support of a principal actually repudiated by the Second Circuit. This case presents the Court with an opportunity to correct the developing conflict among the Circuits and to insure that a jury instruction which has been the source of extensive litigation is finally and unequivocally retired.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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November, 1977

UNITED STATES of America, Plaintiff-Appellee,

v.

William Byron EVANS, a/k/a Wesley Evans, and Lois A. Evans, Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

Boyd E. EVANS, Defendant-Appellant.

Nos. 76–1972 and 76–2498.

United States Court of Appeals, Fifth Circuit.

Sept. 14, 1977.

Defendants were convicted in the United States District Court for the Middle District of Florida, John A. Reed, Jr., J., of fraudulent submission of Medicare claims. Defendants' appeals were consolidated, and the Court of Appeals held that it was proper for the District Court to instruct the jury that a person who makes a statement with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement is deemed to have knowledge of the statement and its truthfulness or lack thereof.

Affirmed.

1. Fraud ⇐69(7)

In prosecution for fraudulent submission of Medicare claims, jury was properly instructed that "a person who makes a statement with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement, is deemed to have knowledge of this statement and its truthfulness or lack thereof." 18 U.S.C.A. § 1001.

2. Fraud ⇐68.10(2)

For purpose of proving that a defendant "knowingly" made a false, fictitious or fraudulent statement or representation in a matter within the jurisdiction of any department or agency of the United States, a person who makes a statement with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement may be deemed to have made the statement "knowingly." 18 U.S.C.A. § 1001.

See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

PER CURIAM:

These consolidated appeals involve the fraudulent submission of claims under the Medicare program. Lois Evans was found guilty on all thirteen counts for violating 18 U.S.C. § 1001.[1] William By-

1. The statute states:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

ron Evans was found guilty on two of these counts, and Boyd D. Evans, in a separate trial, was found guilty on three counts. On appeal, the defendants challenge the trial court's charge to the jury.[2] We find no error and affirm their convictions.

I.

The claim by the Government at both trials was that there was a conscious plan of business activities by all three Evans to submit and cause to be submitted false and excessive bills under the Medicare program for services supplied by the defendants' medical services supply company to elderly citizens on Medicare. The company, Evans Respirator Center (ERC), in which all three Evans had an interest was a company to supply and service respiration equipment. Many of ERC's patients were eligible for Medicare benefits to cover part of the cost of such equipment. ERC initially communicated with patients and determined whether they were eligible for Medicare benefits for services to be rendered to them by ERC. ERC asked the patients to sign a lease for the particular durable equipment that had been prescribed for them. In addition, patients were asked to sign twelve copies of Social Security Administration form No. 1490. The forms were signed in blank and subsequently used by ERC to submit claims for services rendered during the twelve month period covered by the lease agreement. The Government claim, supported by the evidence, was that all three of the Evans participated in a scheme whereby services would be included on these forms and billed to Medicare which the patients did not receive.

II.

[1, 2] The only issue that merits discussion is the claimed impropriety of the trial court's instruction.[3] Specifically, the defendants attack a portion of the charge that reads "the term knowingly and wilfully as used in relation to the making of a statement means the statement must have been made voluntarily, deliberately, and intentionally, and with knowledge of its contents and falsity of its contents as distinguished from the making of a false statement by inadvertence, mistake, carelessness or for any other innocent reason."

"However, a person who makes a statement with *reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement*, is deemed to have knowledge of this statement and its truthfulness or lack thereof." (Emphasis supplied.) The appellants assert that the charge is erroneous on the ground that reckless disregard of the falsity of the statement and a conscious effort to avoid learning the truth does not amount to "knowledge".

than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001. For background on the statute, *see United States v. Lange*, 5 Cir. 1976, 528 F.2d 1280, 1283 n.2.

2. The appellants contend that the district court erred with respect to the exclusion of certain testimony, the scope of examination at trial, and the sufficiency of the evidence to support the verdicts. These contentions are without merit and do not warrant discussion.

3. It is claimed that since Boyd Evans did not object to the instruction below he should be precluded from assigning the charge in question as error. *See, e. g., United States v. Mancuso*, 5 Cir. 1970, 423 F.2d 23, *cert. denied*, 400 U.S. 839, 91 S.Ct. 79, 27 L.Ed.2d 73, *United States v. Bacher*, 5 Cir. 1970, 430 F.2d 663. In light of our disposition, made necessary by the timely objections to the charge by the other defendants, we need not consider this claim.

This charge has been approved in cases involving 18 U.S.C. § 1001 by the Second and Sixth Circuits. *See, e. g., United States v. Abrams*, 2 Cir. 1970, 427 F.2d 86, *cert. denied*, 400 U.S. 832, 91 S.Ct. 64, 27 L.Ed.2d 63; *United States v. Egenberg*, 2 Cir. 1971, 441 F.2d 441, *cert. denied*, 404 U.S. 994, 92 S.Ct. 530, 30 L.Ed.2d 546; *United States v. Thomas*, 6 Cir. 1973, 484 F.2d 909, *cert. denied*, 1974, 415 U.S. 924, 94 S.Ct. 1428, 39 L.Ed.2d 480. In *United States v. Sarantos*, 2 Cir. 1972, 455 F.2d 877, 881, the Second Circuit, approving an instruction similar to that attacked here,[4] relied on its earlier decisions in *Abrams* and *Egenberg* and then stated:

> We stand by our decision in *Abrams*. Its purpose in cases such as this was to prevent an individual like Sarantos from circumventing criminal sanctions merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct. Our ruling in *Abrams* was intended to foreclose this possible loophole, not to create a new crime as defendant suggests. Construing "knowingly" in a criminal statute to include wilful blindness to the existence of a fact is no radical concept in the law. [Citations omitted.]

We are in accord with the Second and Sixth Circuits and with the views expressed in *Sarantos*. In fact, although not addressing the claim raised in the instant case, in *United States v. Lange*, 5 Cir. 1976, 528 F.2d 1280, 1288, we stated that "[a] violation of § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement. The misrepresentation must have been made deliberately, knowingly, and wilfully, or *at least with reckless disregard of the truth and with a conscious purpose to avoid learning the truth*." (Citations omitted and emphasis added.) Consequently, we find that the instruction here is proper and affirm the judgment of the district court.

AFFIRMED.

4. The court in *Sarantos* was faced with a charge that allowed conviction where there was reckless disregard of the truth *or* conscious purpose to avoid learning the truth. The court felt that the use of "or" instead of "and", although not to be recommended, was at worst harmless error. In the instant case, however, properly the conjunctive "and" was used.

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 76-1972
76-2498

D. C. Docket No. 75-105-Or1-Cr-R
UNITED STATES of America,
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v.

William Byron EVANS, a/k/a Wesley Evans, and Lois A. Evans,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Boyd E. EVANS, Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 14, 1977

Issued as Mandate:

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
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October 17, 1977

C O R R E C T E D

TO ALL PARTIES LISTED BELOW:

NO. 76-2498 - U.S.A. v. BOYD E. EVANS
and
NO. 76-1972 - U.S.A. v. LOIS A. EVANS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda M. Hauck
Deputy Clerk

****on behalf of appellants Boyd E. Evans and Lois A. Evans**

cc: Mr. Henry B. Rothblatt
Mr. Mark L. Horwitz

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